

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,302.76, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period October 1, 2004 through September 15, 2018; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On May 3, 2004 appellant, then a 62-year-old office assistant, filed an occupational disease claim (Form CA-2) alleging that she developed pain in the shoulder, wrist, and hand due to repetitive employment activities. She noted that she first became aware of her condition in February 2004 and realized its relation to her federal employment on April 5, 2004. OWCP initially accepted the claim for right nontraumatic rotator cuff tear. It later expanded the acceptance of the claim to include bilateral shoulder sprains, keloid scar, and a second-degree burn of the right upper extremity.⁴ Notification of Personnel Action forms (Form SF-50) dated April 19 and June 17 and 18, 2004 identified appellant's retirement coverage as Federal Employees Retirement System (FERS), Code K. Her service computation date was reported as January 11, 1991.

In August 2003, appellant became eligible to receive SSA age-related retirement benefits.

Appellant stopped work on July 12, 2004. OWCP thereafter paid her wage-loss compensation. After initially placing her on the supplemental rolls, it placed her on the periodic compensation rolls, effective November 28, 2004.

In EN1032 forms dated August 3, 2006 to August 1, 2018, appellant indicated that she had not received SSA benefits as part of an annuity for federal service.

On October 15, 2017 SSA forwarded a FERS/SSA dual benefits calculation to OWCP. The form provided information for the period October 1, 2004 through November 11, 2017 regarding appellant's SSA rate with and without FERS. Based on this information, OWCP prepared an overpayment calculation worksheet.

On December 1, 2017 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$21,013.76 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related retirement benefits that she received for the period October 1, 2004 through November 11, 2017 were based on credits earned while working in the federal government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found her at fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that appellant provide supporting financial documentation including

⁴ Appellant had underwent right shoulder surgery on October 21, 2005 and April 7 and July 19, 2006. She underwent left shoulder surgery on October 26, 2006.

income tax returns, bank account statements, bills, cancelled checks, and pay slips. OWCP also explained its calculation of the overpayment, informed her of the actions she could take, and allotted 30 days for her to respond. It reduced appellant's continuing wage-loss compensation, effective January 6, 2018, to reflect an adjustment for SSA/FERS offset.

On December 12, 2017 appellant requested a prerecoupment hearing before OWCP's Branch of Hearings and Review. She indicated that she disagreed with the fact and amount of the overpayment. On January 9, 2018 appellant submitted a completed overpayment recovery questionnaire in which she indicated that she was receiving a widow's benefit based on her deceased husband's military and civil service career. She further noted that she began working for the employing establishment in 1981. Appellant indicated that she had monthly income of \$1,255.00, monthly expenses of \$1,484.00, and asset value of \$42,000.00.

During the hearing, held telephonically on June 14, 2018, counsel asserted that appellant's SSA income was based on her husband's earnings, stating that SSA told her that she was only receiving benefits due to her husband's earnings, not her own. He asserted that OWCP had not established that she actually received SSA age-related retirement benefits based on her own retirement under FERS. OWCP's hearing representative held the record open for 30 days for the submission of additional evidence.

The record includes SSA information forwarded to OWCP's hearing representative in July 2018. In a letter dated December 20, 2004, SSA advised appellant that, beginning in October 2004, she was entitled to monthly retirement benefits of \$384.50 and survivor benefits of \$3.40. In a letter dated July 12, 2005, it informed her that, based on the death of her husband in May 2005, she would no longer be entitled to survivor benefits, and that beginning in May 2005 she would still receive monthly retirement benefits of \$384.00, based on her own record. By letter dated September 18, 2007, SSA indicated that, based on information it had received from the Office of Personnel Management, appellant was not currently receiving a pension from work not covered by SSA benefits.

In correspondence dated July 12, 2018, the employing establishment maintained that the period of the overpayment was from October 1, 2004 to December 9, 2017.

By decision dated August 22, 2018, OWCP's hearing representative set aside the December 1, 2017 preliminary overpayment determination and remanded the case for further development. On remand OWCP was to obtain written clarification from SSA as to whether appellant continued to receive her own SSA retirement benefits after May 2005, whether the SSA rates they provided, effective October 1, 2004 through December 2016, were based solely on her earnings as a federal employee, and to provide any applicable SSA rate with and without FERS effective December 2017.

By letter dated September 4, 2018, OWCP requested that SSA provide the information as indicated by the August 22, 2018 decision.

On September 22, 2018 SSA explained that appellant began receiving SSA retirement benefits in October 2004 on her own record. Appellant also began receiving auxiliary benefits in October 2004, which became survivor auxiliary benefits in May 2005. In January 2005, she began receiving SSA disability benefits on her own record, which SSA noted were not applicable to offset. Appellant stopped receiving SSA disability benefits in March 2007. She began receiving

SSA retirement benefits again on her own record in April 2007 and ongoing. SSA provided the amount that appellant received in retirement benefits, with and without FERS. It indicated that the computations were based on appellant's SSA benefits only, and that she had been receiving SSA benefits since October 2004 on her own record.

SSA also forwarded a FERS/SSA dual benefits calculation form. It indicated that beginning in October 2004 appellant's SSA rate with FERS was \$345.30 and without FERS \$252.60; beginning in December 2004, her rate with FERS was \$354.30 and without FERS \$259.40; beginning in April 2007, her SSA rate with FERS was \$411.60 and without FERS \$278.80; beginning in December 2007, her SSA rate with FERS was \$421.00 and without FERS \$285.10; beginning in December 2008 and December 2009, her SSA rate with FERS was \$445.50 and without FERS \$301.60; beginning in December 2010, her SSA rate with FERS was \$445.50 and without FERS \$312.50; beginning in December 2011, her SSA rate with FERS was \$461.50 and without FERS \$317.70; beginning in December 2012, her SSA rate with FERS was \$469.30 and without FERS \$317.70; beginning in December 2013, her SSA rate with FERS was \$476.30 and without FERS \$322.50; beginning in December 2014 and December 2015, her SSA rate with FERS was \$484.40 and without FERS \$327.90; beginning in December 2016, her SSA rate with FERS was \$485.80 and without FERS \$328.80; and beginning in December 2017, her SSA rate with FERS was \$495.50 and without FERS \$335.30.

A FERS calculation worksheet indicated that appellant received a \$20,668.96 overpayment of compensation for the period October 1, 2004 through September 15, 2018. OWCP based its FERS offset overpayment calculation on the information SSA provided on September 27, 2018. It, however, incorrectly identified the October and December 2004 SSA rates with FERS as \$354.30 and \$353.40 whereas SSA reported these amounts as \$345.30 and \$354.30 respectively.

On October 4, 2018 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$19,302.76 had been created because it had failed to reduce appellant's FECA wage-loss compensation payments for the period October 1, 2004 through September 15, 2018 to offset her SSA retirement benefits, which were a prohibited dual benefit. It calculated the overpayment by determining the difference between her SSA benefit amount with and without FERS for each period, which resulted in a total FERS/SSA offset for the entire period of \$20,668.96. OWCP then subtracted \$1,366.20 because it had deducted FERS/SSA offsets during the period December 10, 2017 through September 15, 2018. This yielded a total overpayment of compensation in the amount of \$19,302.76. OWCP found appellant at fault in the creation of the overpayment. It explained its calculation of the overpayment and informed her of the actions she could take. OWCP attached an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) and advised appellant to provide supporting financial documentation. It afforded her 30 days to respond.

On October 29, 2018 appellant requested a prerecoupmment hearing before OWCP's Branch of Hearings and Review. She disagreed with the fact and amount of the overpayment.

During the hearing, held telephonically on March 12, 2019, appellant testified that she had only two years of earnings under FERS, from January 2002 through July 2004, and that she was under the Civil Service Retirement System for most of her federal employment. She stated that she had not drawn any retirement based on her own record and maintained that the information from SSA was incorrect. Counsel indicated that he would submit a new overpayment recovery questionnaire. OWCP's hearing representative indicated that the financial documentation was

needed and, if not submitted, he would base his determination on the record. He held the record open for 30 days for the submission of additional evidence. No further evidence was submitted.

By decision dated May 23, 2019, OWCP's hearing representative finalized the overpayment determination. He found that appellant received an overpayment of compensation in the amount of \$19,302.76 for the period October 1, 2004 through September 15, 2018 because she received a prohibited dual benefit from SSA while she concurrently received FECA compensation without appropriate offset. The hearing representative referenced section 8129 of FECA and section 10.433(a) of OWCP's regulations. He found appellant without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, explaining that she did not submit any financial documentation to support her reported income, expenses, and resources. The hearing representative required recovery by deducting \$300.00 every 28 days from her continuing FECA compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.⁷ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

Beginning October 1, 2004, appellant received FECA wage-loss compensation while receiving age-related retirement benefits from SSA without appropriate offset. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and age-based SSA

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see J.S.*, Docket No. 19-0824 (issued October 4, 2019); *S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

retirement benefits attributable to federal service for the same period.⁹ Consequently, the fact of overpayment has been established.¹⁰

The Board finds, however, that OWCP improperly calculated appellant's overpayment. To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS and without FERS for specific periods from October 1, 2004 to September 15, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet and in its October 4, 2018 preliminary overpayment determination. However, in setting forth the FERS offset amounts on its FERS calculation worksheet, OWCP entered incorrect amounts for SSA rates with FERS for the periods beginning October 1 and December 1, 2004. As the amount of overpayment for these two periods has not been established, the amount of the total overpayment has not been established.¹¹

As such, the Board finds that the case must be remanded to OWCP. On remand OWCP shall determine the proper amount of the overpayment of compensation based on the correct rates provided by SSA for the period during which the overpayment occurred. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds this case is not in posture for decision.

⁹ See *D.C.*, Docket No. 19-0118 (issued January 15, 2020).

¹⁰ *Id.*

¹¹ See *L.B.*, Docket No. 19-1322 (issued January 27, 2020).

¹² As the case is not in posture for decision regarding the amount of overpayment, the issues of waiver of recovery and repayment of the overpayment are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: September 28, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board